

Abdul Wahid (Migration) [2024] AATA 1637 (29 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Abdul Kareem Abdul Wahid
REPRESENTATIVE:	Mr Amarjit Singh Anand
CASE NUMBER:	2403139
HOME AFFAIRS REFERENCE(S):	BCC2023/7592414
MEMBER:	Mary Sheargold
DATE:	29 May 2024
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 489 - Skilled - Regional (Provisional) visa.

Statement made on 29 May 2024 at 12:13pm

CATCHWORDS

MIGRATION – cancellation – Skilled Regional Sponsored (Provisional) (Class SP) visa – Subclass 489 (Skilled - Regional (Provisional)) – fact or circumstance no longer the case – secondary visa holder husband no longer member of family unit of primary visa holder wife – validly married – previous low-level tension because of ethnic/religious differences – one heated argument, scuffle and phone broken by husband – wife's report to police and intervention order – wife's report of separation to department, without realising it would lead to cancellation of husband's visa – compliance with order by both, followed by reconciliation – cognitive behaviour therapy by husband and support from family and friends – oral and documentary evidence – requirement continues to be met and ground for cancellation does not arise – decision under review set aside

LEGISLATION

*Migration Act 1958 (Cth), ss 5F(1), (2)(a), 116(1)(a)
Migration Regulations 1994 (Cth), Schedule 2, cl 489.311*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 19 February 2024 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 489 - Skilled - Regional (Provisional) visa under s 116 of the *Migration Act 1958* (Cth) (the Act).
2. The delegate cancelled the visa under s 116(1)(a) on the basis that Mr Abdul Wahid was no longer a member of the family unit of his wife, Mrs Azmina Rasheed Ali. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 29 May 2024 by MS Teams video link from Adelaide to give evidence and present arguments. The Tribunal also received oral evidence from his wife, Mrs Azmina Rasheed Ali.
4. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s 116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s 116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

s 116(1)(a) - Fact or Circumstance for visa grant no longer exists

7. A visa may be cancelled under s 116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists. In this case, the delegate found that Mr Abdul Wahid was no longer the member of the family unit of Mrs Rashmeed Ali because she had reported their separation to the Department, and the delegate was not satisfied that their relationship was genuine and continuing.
8. Section 5F(1) of the Act defines a person as being the spouse of the other person if they are in a married relationship. Section 5F(2) of the Act provides a four-part cumulative test for a 'married relationship' being if:
 - a. they are married to each other under a marriage that is valid for the purposes of this Act; and
 - b. they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - c. the relationship between them is genuine and continuing; and
 - d. they:

- i. live together; or
- ii. do not live separately and apart on a permanent basis.

9. Mr Abdul Waheed and Mrs Rashmeed Ali met in Colombo, Sri Lanka, in 2015. They worked together in an IT firm, and after a year of friendship, sought their families' consent to marry. There is no contention as to their marriage being valid as required in s 5F(2)(a).
10. Mrs Rashmeed Ali told the Tribunal that there was always some low level tension in their relationship as they each came from differing Muslim groups in Colombo, the Moors and the Malays. Mrs Rashmeed Ali stated that there were some differences in terms of vernacular and parlance that were mostly responsible for that tension, but that it was not unusual for Sri Lankan Muslims to marry between differing groups.
11. The couple share a 4 year old son, and the family unit migrated to Australia in 2021. At first, Mrs Rashmeed Ali and her son remained living in Sydney with Mrs Rashmeed Ali's sister and her family, while Mr Abdul Wahid travelled to Adelaide ahead of them to establish employment and a stable household for their child. They have lived in Adelaide as a family for over 2 years.
12. On 8 December 2023, the couple admit to having engaged in a heated argument that started over 'silly stuff' but escalated. Mrs Rashmeed Ali's evidence is that she did not like the language her husband used to describe her during their arguments, and Mr Abdul Wahid admitted that he had a habit of goading Mrs Rashmeed Ali during arguments in order to make his points. In this instance, both parties state that Mrs Rashmeed Ali had begun to record the argument on her phone, and Mr Abdul Wahid realised she was doing this. Mrs Rashmeed Ali thinks it was probably the third time she had recorded one of their arguments. However, this time, Mr Abdul Wahid attempted to prise the phone from her hands to stop the recording; there was a brief scuffle, and eventually the phone was smashed on the floor. At that point, Mrs Rashmeed Ali scooped up their son and went to a neighbour's house to call the police.
13. The police attended the address and questioned Mr Abdul Wahid before arresting him and taking him to the local police station where an intervention order was issued. He was placed on bail and a hearing in relation to the intervention order was set for 14 December 2023. While he was at the police station, Mrs Rashmeed Ali gathered belongings for herself and her son, and her other sister, who was resident in Adelaide, drove around to pick them up. Mr Abdul Wahid was then able to return to the home. Both parties gave evidence that Mr Abdul Wahid fully complied with the conditions of the intervention order and that Mrs Rashmeed Ali did not attempt to contact him directly while the order was in place.
14. Mrs Rashmeed Ali presented as a courteous, law abiding citizen with a strong belief in following rules. She told the Tribunal that she had decided to call the Department to report that she had separated from Mr Abdul Wahid because she had remembered reading it was an important condition of the visa that she provide any relevant updates to the Department, and she did not wish to risk her visa being cancelled for non-compliance. She states she did not appreciate the possibility that Mr Abdul Wahid would be considered for cancellation of his visa, as in her view, they were both simply abiding by the laws of South Australia, awaiting a court hearing in respect of the intervention order.
15. The Tribunal learned that the couple had attempted to engage mutual friends to help them to communicate regarding their differences while the intervention order was in place, and Mrs Rashmeed Ali demonstrated her great relief at the ability for them to share their struggles with friends and to realise they were not alone; something she claims to have asked Mr Abdul Wahid to realise over many years in their relationship. Mrs Rashmeed Ali's evidence

is that she felt they were on the path to reconciling their relationship, and that she was shocked to learn from those mutual friends that Mr Abdul Wahid's visa had been cancelled.

16. Mrs Rashmeed Ali claims that even a week after their separation, she began to miss Mr Abdul Wahid and wished to reconcile with him, but was very worried about breaching the conditions of the intervention order and was careful to make sure she followed the advice she received from SAPOL as well as the Women's Legal Service in Adelaide, where she says she was told to remain at her sister's house and not to contact Mr Abdul Wahid nor allow him to see their son. It was at this point that she initiated communications via mutual friends. Mrs Rashmeed Ali said her sister, who is unmarried, was very supportive of her and her son and wished for the best for them, and she encouraged a reconciliation if it was possible. It was her sister who drove her to the police station and to find a Justice of the Peace in order to help her drop the charges against Mr Abdul Wahid on the same night that his visa was cancelled.
17. The Tribunal accepts that Mrs Rashmeed Ali maintained that she had an ongoing commitment to her marriage to Mr Abdul Wahid at all material times, and that once she had regained her composure after the first dispute they had had where any physicality was involved – which understandably took some time – she was hopeful to repair their relationship and move forward in a more positive fashion. Mr Abdul Wahid stated that he only learned that his wife had dropped the charges against him when he arrived at court for his scheduled hearing on 20 February 2024 – the day immediately after his visa was cancelled.
18. Each party gave independent evidence that they began to communicate directly once Mr Abdul Wahid was advised he was allowed to do so, and that on 1 March 2024, Mrs Rashmeed Ali and their son returned to the family home. They report that their son has revealed a more bubbly and exuberant personality now that his family unit has been restored.
19. Mr Abdul Wahid took considerable time to explain to the Tribunal the lessons he has learned and the ways in which he believes he changed as a result of the incident on 8 December 2023. Mrs Rashmeed Ali appears delighted with her husband's newfound respect, patience and tolerance for her and for their son, and they remain optimistic that they will not return to an unhealthy level of argument such as was exhibited on that particular day.
20. Mr Abdul Wahid has attended regular sessions with a clinical psychologist since January this year, using cognitive behavioural therapy to assist him to manage his generalised anxiety, and has reported that his anger management has improved markedly as a result. He also participates in community programs with Uniting Care and has a counsellor he sees there on a regular basis, and stated that the counsellor believes he has made a large transformation already. Mr Abdul Wahid has self-identified as being approximately 50% through his journey to self-betterment, and he expressed his desire to continue working with counsellors to reach and remain at 100%.
21. Mr Abdul Wahid was able to articulate the serious impact that one small interaction can have on a person's life. He stated that one argument had the potential to cost him his marriage, a life watching his son grow up, and the chance to live and work in Australia. He noted that on his visa being cancelled, he had to resign from his job (though his employment was reinstated after he was granted a Bridging Visa E with working rights). It was clear to the Tribunal that he has taken very seriously his obligations to improve his attitude and behaviour even prior to the decision to cancel his visa; he emphasised the importance of his marriage and family to him in the long term. Mrs Rashmeed Ali declared she would not have been prepared to throw away her marriage of 8-9 years over a single fight, and expressed regret for having involved the police.

22. The Tribunal emphasised its primary concern was that Mrs Rashmeed Ali felt she was in a stable, safe long term environment for her and for her son, as well as emphasising the importance of prioritising her health and safety when it was necessary, but ultimately accepted Mrs Rashmeed Ali's evidence that she does continue to have a truly genuine and continuing relationship with Mr Abdul Wahid.
23. The Tribunal is also satisfied with the oral evidence and supporting documentary evidence provided by the applicant (such as statutory declarations, utility bills, lease agreements, and rental stubs) that Mr Abdul Wahid has maintained continuous residency at the family home in Campbelltown, Adelaide, and that Mrs Rashmeed Ali and their son have returned to that address on 1 March 2024. Therefore, the Tribunal is satisfied that, at the time of its decision, the couple lives together.
24. Based on all the evidence available to the Tribunal at review, noting the stark contrast in circumstances that emerged less than 24 hours after Mr Abdul Wahid's visa was cancelled, the Tribunal is satisfied that Mr Abdul Wahid is Mrs Rashmeed Ali's spouse as defined in the Act, and that he is therefore a member of her family unit, and that on that basis, he continues to meet the requirement in cl 489.311 of Schedule 2 to the Regulations.
25. For these reasons, the Tribunal is not satisfied that the ground for cancellation in s 116(1)(a) exists. It follows that the power to cancel the applicant's visa does not arise.

DECISION

26. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 489 - Skilled - Regional (Provisional) visa.

Mary Sheargold
Member